

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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JUN 26 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)

Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)

CC Docket No. 96-115

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**REPLY COMMENTS OF THE
ASSOCIATION OF DIRECTORY PUBLISHERS**

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SUMMARY

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SUBSCRIBER LIST INFORMATION:

- IS THE FOUNDATION OF YELLOW PAGES PUBLISHING
- IS AN ESSENTIAL FACILITY WITHOUT WHICH A TELEPHONE DIRECTORY CAN NOT BE PUBLISHED

CONGRESS ENACTED SECTION 222 (E) TO:

- PREVENT LECS FROM UTILIZING ANTICOMPETITIVE TACTICS TO MAINTAIN CONTROL OVER THE YELLOW PAGES DIRECTORY MARKET
- ALLOW THE PUBLIC TO REAP THE REWARDS OF COMPETITION IN THE YELLOW PAGES DIRECTORY MARKET

THE YELLOW PAGES PUBLISHERS ASSOCIATION:

- SPEAKS FOR THE TELEPHONE COMPANIES, NOT DIRECTORY PUBLISHERS

THE COMMISSION MUST DEFINE SUBSCRIBER LIST INFORMATION AND THE TERMS UNDER WHICH IT IS TO BE PROVIDED:

- SUBSCRIBER LIST INFORMATION INCLUDES UPDATED LISTINGS
- "REASONABLE RATES" ARE RATES BASED ON INCREMENTAL COSTS
- "TIMELY" MEANS WITHIN 20 DAYS
- LECS MAY NOT REFUSE TO PROVIDE SUBSCRIBER LIST INFORMATION BECAUSE THEY BELIEVE IT WILL NOT BE USED FOR DIRECTORY PUBLISHING
- THE NAMES AND ADDRESSES OF NON-PUBLISHED LISTINGS ARE ESSENTIAL AND MUST BE TURNED OVER TO DIRECTORY PUBLISHERS

PRIMARY OVERSIGHT OF SECTION 222 (e) :

- RESTS WITH THE COMMISSION
- STATE PUCS MAY PROMULGATE REGULATIONS CONSISTENT WITH THE STATUTE

REPLY COMMENTS OF THE ASSOCIATION OF DIRECTORY PUBLISHERS

The Association of Directory Publishers ("ADP")¹, by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

The comments reflect the predictable division between independent directory publishers -- represented by ADP -- on the one hand, and the local exchange telephone industry (and its captive trade association, the Yellow Pages Publisher's Association), on the other. ADP urges the adoption of rules to make the statutory provision efficiently effective, while the telephone industry would prefer to retain the opportunity to continue the very practices that the statute was enacted to curtail.

1. THE YELLOW PAGES PUBLISHERS ASSOCIATION SPEAKS FOR THE TELEPHONE COMPANIES, NOT DIRECTORY PUBLISHERS.

ADP is particularly concerned that some confusion might result from the comments filed by a trade association called the Yellow Pages Publishers' Association. That organization, formerly known as the National Yellow Pages Service Association, was formed by AT&T many years before the 1984 AT&T divestiture to manage the placement of "national" yellow pages advertising. National advertising is advertising placed directly by major nationwide firms (such as rental car companies) in numerous directories around the country. In order for a directory publisher -- independent or telephone company-affiliated -- to participate in the national advertising business, it must be a member of YPPA. YPPA's Bell System heritage is reflected in its bylaws, which apportion voting rights based on the member's revenues. Thus, while the independent

¹ ADP, a trade association representing the interests of "independent" telephone directory publishers, that is, telephone directory publishers not affiliated with local exchange telephone companies, filed initial comments in this proceeding.

publisher members of YPPA greatly outnumber the LEC-affiliated members, the LEC-affiliated members totally control and dominate the affairs of YPPA.

The telephone companies used their dominant voting position in YPPA to make YPPA a lobbying front in their efforts to block the legislation that became Section 222(e). During the deliberations over the Telecommunications Act of 1996, over 120 YPPA members -- 67 percent of its membership -- sent a joint letter to all conferees, stating that they "oppose strongly" and "dissent" from YPPA's positions concerning subscriber list information.² YPPA's comments reflect only the interests of LECs and their directory publishing affiliates and not those of independent directory publishers.³

In response to ADP members' complaints (and threats of suit) about the conflict of interest inherent in YPPA's dual role as coordinator of national advertising for all yellow pages publishers and legislative spokesman for only a few powerful ones, at the end of 1996 YPPA membership will cease to be a prerequisite to participation in national advertising. YPPA will then no longer be able to force the majority of yellow pages publishers to finance advocacy on behalf of the powerful minority of telephone company affiliated publishers.

² See, e.g., Joint letter of YPPA members to Hon. Larry Pressler, Chairman, Committee on Commerce, Science, and Transportation (Dec. 5, 1995) (Exhibit 2). As demonstrated throughout these comments, ADP members -- many of whom belong to YPPA -- continue to oppose strongly the views expressed by YPPA.

³ For example, YPPA attacked ADP's subscriber list information pricing formula as too low and instead proposed an alternate formula which would provide LECs with a return far in excess of their costs. See Section III.B., *infra*. That YPPA prefers a formula imposing high costs on directory publishers is evidence of its control by LECs and their affiliated publishers. Surely an independent publisher would not argue for higher prices for an essential input.

The LECs' willingness and ability to use YPPA in this way, over the objections of the independent publishers that constitute a majority of YPPA's members, illustrates the enormous disparity of power between the LECs and independent publishers. That is the disparity that makes Section 222(e), and Commission rules to implement it, necessary.⁴

II. COMMISSION OVERSIGHT AND REGULATION IS NECESSARY FOR SECTION 222(e) TO BE FULLY EFFECTIVE.

Certain commenters maintained that there was no need for Commission regulations implementing Section 222(e), either because the directory market is competitive or because the statute is clear on its face.⁵

Section 222(e) was enacted precisely because market forces were insufficient to temper LECs' monopoly control over subscriber list information.⁶ The LECs' argument that the provision of subscriber list information should be left to market forces and private negotiation is based on the counterfactual notion that the directory publishing market is competitive. In a market in which the LEC-affiliated publishers hold a 93.6 percent share, effective competition is neither present nor imminent.⁷

⁴ YPPA admits that "many of [its] members are affiliated with local telephone exchange carriers." See YPPA comments at 1. It is also noteworthy that LECs are characterizing YPPA's comments as representative of the directory publishing industry. See, e.g., Ameritech comments at 17.

⁵ See, e.g., YPPA Comments at 2,13-15; ALLTEL Comments at 6; GTE Comments at 18; SBC Comments at 16; NYNEX Comments at 22; Ameritech Comments at 17; USTA Comments at 6.

⁶ See, e.g., Floor Statement of Rep. Bill Paxton (Feb. 6, 1996) (LECs have limited competition in the telephone directory market) (Exhibit 3); Floor Statement of Rep. Joe Barton (Feb. 1, 1996) (LECs' anticompetitive acts have "deprived consumers and advertisers of cheaper, more innovative, more helpful directories") (Exhibit 4).

⁷ SBC's claim that the directory market is "highly competitive, see SBC Comments at 18, ignores the fact that independent directory publishers

Unregulated private negotiations between a monopolist with sole control over the subscriber listing information on one side and a small independent directory publisher for whom such information is essential on the other would be unlikely to produce a procompetitive result. That is why Congress passed Section 222(e).

Despite the passage of Section 222(e), various LECs are still refusing to provide subscriber list information,⁸ updates or business headings.⁹ As of May 1996, other LECs were charging prices more than twenty times greater than the 4-5 cents per listing price determined to be "reasonable" by both the Florida Public Service Commission and the Canadian Radio-Television and Telecommunications Commission.¹⁰ And, still other LECs continue to threaten to require independent directory publishers to purchase subscriber list information for geographic areas far in excess of those desired by the

hold only a 6.4 percent market share, see "Yellow Pages Revenues Expected To Surpass \$10 Billion in 1996," Business Wire (April 2, 1996).

⁸ The City of Fairbanks, Alaska -- which owns and operates a local exchange carrier -- has spurned repeated requests for subscriber list information because (1) the FCC had yet to promulgate rules, (2) its workforce was too busy, and (3) it might be able to obtain an exemption from the Alaska PUC. See Exhibit 10. See also Letter from David C. Henry, Whidbey Telephone Co., to Mac MacGregor, MacGregor Publishing Co. (April 3, 1996) ("[W]e cannot, at this time, commit to providing you with [subscriber list information].") (Exhibit 7 to ADP's initial comments).

⁹ ALLTEL has refused to respond to repeated inquiries seeking to obtain updates. See Memo from Dolores Wagner, White Directory Publishers, Inc., to Bill Hammack, Chairman, ADP Legal Affairs Committee (June 24, 1996) (Exhibit 5). Likewise, GTE, which has yet to offer an update service, refuses to provide business listings separate from residential listings. See id.

¹⁰ Almost four months after the passage of Section 222(e), ALLTEL was charging 98 cents per listing plus a \$500 administrative fee. See Exhibit 6. At the same time, the Molalla Telephone Co. was charging 75 cents per listing plus several hundred dollars in fees. See Exhibit 7.

publisher as a condition of obtaining any listings.¹¹ In light of the ongoing and recent abuses by LECs, Commission regulation is necessary to prevent LECs from continuing to leverage their monopoly control over subscriber list information into the directory publishing market and to allow -- as Congress desired -- the public to reap the fruits of competition in the directory market.

III. THE COMMISSION MUST DEFINE SUBSCRIBER LIST INFORMATION AND THE TERMS UNDER WHICH IT IS TO BE PROVIDED.

To avoid inefficient and costly *ad hoc* adjudication of complaints, the Commission should adopt rules governing the directory publishers' access to subscriber list information. ADP highlights below some of the areas which must be addressed in such rules. In Exhibit 1, ADP provides draft regulations to implement Section 222(e).

A. Subscriber List Information Includes Updated Listings.

ADP and other commenters stated that it is imperative that the Commission make explicit that Section 222(e) requires LECs to make available updated subscriber list information (new connects, change of address, etc.) to non-affiliated publishers on at least a weekly basis.¹² That position is supported by the House Commerce Committee Report which provides that Section 222(e) "is intended to ensure that [independent directory publishers] are able to purchase . . . subscriber listings and updates."¹³ As a practical matter,

¹¹ The Canby Telephone Company has reserved the right to "require [independent directory publishers] to purchase the entire North Willamette Valley directory in order to obtain the prefixes desired." See Exhibit 8.

¹² See ADP Comments at 13; MCI Comments at 22; YPPA Comments at 11.

¹³ See H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) ("House Report").

updates are critical to directory publishers, both to maintain the accuracy of their overall database and because (1) people moving into a new community are most likely to refer to, and benefit from, yellow pages advertising and (2) new businesses are particularly likely to need such advertising. For those reasons, LECs provide updated information to their own affiliated publishers.

Without updates, independent directory publishers will have an inferior product because their directories will reach a more limited audience than affiliated directories.¹⁴ The availability of updated information would have the added benefit of ending many LECs' anticompetitive practice of forcing competing publishers to pay for all listings anew every year rather than buying an initial list and maintaining it through updates.¹⁵

USTA and Vitelco hypothesize that a requirement to provide updates would somehow allow competing directory publishers to "impose onerous burdens upon [LECs] under the guise of Section 222(e) by making unreasonable requests for updated information."¹⁶ How and why that would occur is not clear. In any event, the Commission would be available to resolve any claim that a telephone company was the victim of unreasonable requests. As a general principle, a reasonable request would be any request that allowed an independent publisher to obtain competitively meaningful access to updates at prices fairly compensatory to the telephone company.

14 GTE advertises that its directory is "mailed within 24 hours of any new GTE phone installation." (Exhibit 9).

15 Ameritech provides updates to directory publishers for that very reason. See Ameritech Comments at 19.

16 See Vitelco Comments at 3-4; USTA Comments at 6-7.

Vitelco further asserts that updates are unnecessary because directory publishers can locate new businesses through other means such as the "Chamber of Commerce, new business licenses, and advertisements by new businesses."¹⁷ Vitelco does not require its affiliated publisher to do that, for the simple reason that no entity -- not even the tax authorities -- has a list as complete and current as the telephone company's subscriber list. Many of the small businesses that rely on the yellow pages do not join chambers of commerce and advertise nowhere else. ADP members faced with telephone company refusals to deal have tried to find alternatives, and have uniformly concluded that there are none. To accept Vitelco's argument, and thereby to allow LEC-affiliated publishers to have earlier and more comprehensive opportunities to solicit new businesses for yellow pages advertising, would frustrate the purpose of Section 222(e).¹⁸ Vitelco's argument also overlooks the essential nature of updated information.¹⁹ In that regard, ADP notes that many LECs either refuse outright to provide subscriber list information updates or claim that such updates are not yet available due to technical or other concerns.²⁰ (Given the above, the Commission must make clear that updates are to be made

¹⁷ Vitelco Comments at 3.

¹⁸ ADP notes that many LECs historically refused to provide updates to competing publishers and then advertised that their directories were more accurate and complete than those of publishers denied access to updates.

¹⁹ The former President and CEO of Southwestern Bell Yellow Pages has stated that a publisher that does not receive updates "cannot compete in the market with a publisher which does have [such] access." See Affidavit of A.C. Parsons at para. 19, (Exhibit 1 to ADP's initial comments). Like affiliated publishers, competing directory publishers should be able to deliver directories to new telephone subscribers.

²⁰ See Section II, supra.

available to competing directory publishers on at least a weekly basis²¹ and at rates, terms and conditions that, in practical competitive effect, are no less favorable than those made available to LEC-affiliated publishers.²²

B. "Reasonable Rates" Are Based on "Incremental Costs".

YPPA, and several LECs oppose ADP's position that "reasonable rates" for subscriber list information are rates based on incremental cost.²³ YPPA and GTE assert that ADP's efforts to equate "reasonable rates" with incremental costs are "patently unsupportable" because ADP failed to convince Congress to insert incremental cost language into Section 222(e).²⁴ However, Congress' decision to leave the defining of "reasonable rates" to the Commission as the expert agency does not mean that Congress rejected incremental cost as the foundation for a "reasonable rate." Congress seldom has enacted statutes delineating the costing formula to be followed by the Commission in such circumstances.²⁵ Indeed, two conferees to the Telecommunications Act of 1996

²¹ YPPA states that LECs provide subscriber list information "on a daily or weekly basis" to their affiliated publishers. See YPPA Comments at 5-6.

²² Because the Constitution allows publishers to copy freely subscriber list information from telephone white pages, see Feist Pub. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), Congress would have little reason to codify the same right in Section 222(e). Thus, Section 222(e) was intended to include updates. See House Report, supra at note 13.

²³ See, e.g., YPPA Comments at 7-10; GTE Comments at 18-19; CBT Comments at 12; ALLTEL Comments at 7. But see MCI Comments at 22-23 (subscriber list information price should be set at Total Service Long Run Incremental Cost).

²⁴ YPPA errs in asserting that the California PUC ("CPUC") has rejected incremental cost for subscriber list information. As YPPA is well aware, the CPUC has yet to decide the appropriate price mechanism for subscriber list information and has authorized only an interim price pending resolution of the pricing issues.

²⁵ See, e.g., Sections 226(h), 254(b)(1), 254(i), & 332 of the Communications Act.

stated their belief that a "reasonable rate" was one based on "incremental cost."²⁶

In contrast, YPPA argues that the price per listing should include (1) the incremental cost of providing subscriber list information to the requesting publisher, (2) a portion of the cost of collecting and maintaining the data, and (3) the value of the data.²⁷ Essentially, YPPA contends that:

Price = cost + value.

That price, however, would be twice the level that would occur in an efficient market²⁸ because, in an efficient market, prices approximate costs such that:

Price = cost = value.

Aside from a double recovery, the "value" element proposed by YPPA would allow monopolist LECs to deter entry by capturing all expected profits from market entry. In other words, by receiving a payment for the "value" of subscriber list information, LECs would be able to price subscriber list information well above costs, thereby making it more difficult for a new directory publisher to enter the market and compete with LECs.

LECs currently charge subscriber list information prices that are far in excess of their costs. Southwestern Bell and BellSouth cost data indicates that the incremental cost per listing is between one one-thousandth and three

²⁶ See Floor Statements of Rep. Paxon (Exhibit 3) and Rep. Barton (Exhibit 4). Additionally, in an April 1996 Report, the Economic and Monetary Affairs Committee of the European Parliament declared that subscriber list information should be made available to competing directory publishers at marginal cost.

²⁷ See YPPA Comments at 8-9.

²⁸ A market may be efficient because of competition (market forces) or because of regulation.

one-thousandths of one cent.²⁹ The Florida Public Service Commission and, more recently, the Canadian Radio-Television and Telecommunications Commission ("CRTC") have found that a LEC earns a "reasonable profit" by charging a price of 4 to 5 cents per listing.³⁰ Many LECs, however, are charging prices more than twenty times that found reasonable by the Florida PSC and the CRTC.³¹ Such a profit margin reflects LECs' monopoly power and cannot be considered reasonable. Thus, regardless of what pricing mechanism the Commission adopts, at a minimum, it must bring subscriber list information prices in line with those found reasonable by the Florida PSC and CRTC.³²

C. "Timely" Means Within 20 Days.

In order for Section 222(e) to have meaning, it is imperative that "timely" be defined as a set number of days.³³ Many LECs refuse to respond to subscriber list information requests for weeks or months.³⁴ For example, despite repeated requests following the passage of Section 222(e), GTE has

²⁹ See Christopher C. Pflaum, Ph.D, Competitive Issues Relating to Subscriber Listing Information at 11-12 & attachment A (attached to ADP's initial comments).

³⁰ See id.

³¹ See Exhibits 6 & 7.

³² Assuming that LECs' incremental costs remain a thousandth of a cent, a price of 4 cents per listing represents a profit margin of 4,000 percent.

³³ Several LECs argued that the Commission should leave the term "timely" to the market. See, e.g., YPPA Comments at 5-6; NYNEX Comments at 22; Ameritech Comments at 18; SBC Comments at 17; USTA Comments at 6.

³⁴ See footnote 9, supra. See also Letter from Gerry Screven, DirectMedia Corp. to Bill Hammock, BRI, Inc. (June 24, 1996) (stating that ALLTEL has failed to respond to requests to provide basic subscriber listing information) (Exhibit 11).

continually delayed offering terms for an update service.³⁵ Consequently, ADP believes that requiring LECs to fill subscriber list information requests within 20 days is reasonable and accords with the statute.³⁶ Of course, the subscriber list information to be provided must be up-to-date.³⁷

D. LECs May Not Refuse To Provide Subscriber List Information Because They Suspect It Will Not Be Used For Directory Publishing.

YPPA contends that LECs should be allowed to reject subscriber list information requests if they believe the information is to be used for purposes other than directory publishing.³⁸ YPPA obviously just wants to make it harder for new firms to enter the directory business in competition with YPPA's incumbent monopolist members. Even the comments filed by the LECs in their own names did not seek such broad authority to restrict entry, but rather stated that requiring subscriber list information requests to be in writing would be a reasonable safeguard.³⁹ ADP agrees that a written request should be sufficient. Policing of the use or misuse of subscriber list information is a task for the Commission, not the LECs.⁴⁰

³⁵ See id.

³⁶ See ADP Comments at 22. See also YPPA Comments at 5 ("timely" should mean within "a reasonable time."); NYNEX Comments at 22 (same).

³⁷ YPPA notes that subscriber list information is provided on a daily or weekly basis by LECs to their affiliated publishers. See YPPA Comments at 5-6. Thus, the subscriber list information turned over to competing directory publishers must be of the same freshness.

³⁸ See YPPA Comments at 12.

³⁹ See, e.g., ALLTEL Comments at 7; NYNEX Comments at 22; Ameritech Comments at 19; PacTel Comments at 19; Sprint Comments at 6-7.

⁴⁰ See ADP comments at 22-24. It would be extremely difficult to prove that a party was going to use subscriber list information in an unauthorized manner prior to the party actually doing so.

E. Unpublished Information Should be Made Available To Directory Publishers for Use in Delivery.

ADP agrees with MCI that LECs must make available the names and addresses of those subscribers having non-published or non-listed listings.⁴¹ ADP of course acknowledges the need to respect the subscribers' desire that their listing information not be published, but that should not preclude use of such subscribers' names and addresses to deliver directories to them.⁴² Ubiquity of delivery is a key dimension of directory competition. So long as the LECs' publishers continue to use unpublished information for delivery, other publishers should have the opportunity to do likewise.⁴³ Thus, to ensure the level playing field envisioned by Section 222(e), the names and addresses of non-published and non-listed subscribers must be available to all directory publishers for delivery purposes.⁴⁴

IV. PRIMARY OVERSIGHT OF SECTION 222(E) RESTS WITH THE COMMISSION.

Two LECs argue that state PUCs, rather than the Commission, should have primary jurisdiction over Section 222(e). Their comments, however, were contradictory concerning the experience of state PUCs with subscriber list information.⁴⁵ More importantly, only one state PUC filed comments in the

⁴¹ See Attachment A to MCI Comments.

⁴² NYNEX, Sprint, and YPPA asserted that no information concerning non-published subscribers need be turned over to directory publishers because such information is not "for publication." See NYNEX Comments at 21; Sprint Comments at 6; YPPA Comments at 4.

⁴³ LECs have advertised that their directories are the only directories delivered to such subscribers.

⁴⁴ Ameritech and certain Bell Atlantic subsidiaries such as Bell of Pennsylvania offer such listings for delivery purposes only.

⁴⁵ Compare Vitelco Comments at 4 (arguing in favor of state PUCs because they are in the best position to interpret the statute) with PacTel

instant proceeding and that PUC asserted only that "[s]tates should play an active role in ensuring compliance with [Section 222(e)]."⁴⁶ ADP agrees that state PUCs should take an active role if they want to do so, by enacting rules and overseeing tariffs, so long as those rules and tariffs are consistent with Section 222(e).⁴⁷

Comments at 19 (contending that for most companies, "provision of [subscriber list information] is not regulated.").

⁴⁶ See Comments of California PUC at 8-9.


⁴⁷ See ADP Comments at 13-14. As noted in ADP's initial comments, Section 222(e) enunciates a uniform national policy concerning subscriber list information. For that reason, the Commission must have primary oversight as otherwise Section 222(e) could have different meanings in different states. To prevent such frustration of Congress' goals, state regulation inconsistent with the statute is preempted. See ADP Comments at 13-14 & n.37. See also Preemption of Local Zoning Regulation of Satellite Earth Stations, 61 Fed. Reg. 10710, 10896 (1996) (state laws that frustrate federal policies are preempted no matter how important the preempted law is to the state or locality).

CONCLUSION

For the foregoing reasons, the Association of Directory Publishers urges the Commission to adopt rules concerning the provision of subscriber list information substantially in the form of the draft rules submitted with these reply comments.

Respectfully submitted,

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26 June 1996

EXHIBIT LIST

- Exhibit 1 Draft Implementation Regulations For Section 222(e)
- Exhibit 2 Joint letter of YPPA members to Hon. Larry Pressler,
Chairman, Committee on Commerce, Science, and Transportation
(Dec. 5, 1995)
- Exhibit 3 Floor Statement of Representative Bill Paxson (Feb. 6, 1996)
- Exhibit 4 Floor Statement of Representative Joe Barton (Feb. 1, 1996)
- Exhibit 5 Memo from Dolores Wagner, White Directory Publishers, Inc.,
to Bill Hammack, Chairman, ADP Legal Affairs Committee (June
24, 1996)
- Exhibit 6 ALLTEL Contract
- Exhibit 7 Mollalla Telephone Co. Contract
- Exhibit 8 Canby Telephone Ass'n Contract
- Exhibit 9 GTE Advertisement
- Exhibit 10 Letter from Patrick B. Cole, Deputy City Attorney, City of
Fairbanks, Alaska to Swen A. Mortenson, President, Phone
Directories Company, Inc. (March 18, 1996)

Letter from Frank Biondi, General Manager, Fairbanks
Municipal Utilities System to Swen A. Mortenson, President,
Phone Directories Company, Inc. (April 15, 1996).
- Exhibit 11 Letter from Gerry Screven, DirectMedia Corp. to
Bill Hammock, BRI, Inc. (June 24, 1996)

EXHIBIT 1

ASSOCIATION OF DIRECTORY PUBLISHERS'

PROPOSED RULES TO IMPLEMENT SECTION 222(e)

§ 64.XXX1. SUBSCRIBER LIST INFORMATION. (a) Any telecommunications carrier that provides telephone exchange service shall provide subscriber list information to directory publishers on a timely, unbundled basis and on nondiscriminatory and reasonable rates, terms, and conditions.

(b) "Subscriber list information" means any information identifying the names, addresses, telephone numbers, or primary classified advertising (line of business) classifications of a telecommunications carrier's subscribers (or any combination of such names, addresses, telephone numbers, or classifications) that such carrier has published, caused to be published, or accepted for publication in any form of telephone directory (including, but not limited to directories produced in printed, electronic, or optical form).

(c) "Timely" provision of subscriber list information means (i) the provision of up-to-date subscriber list information within not more than 20 (twenty) days of a request and (ii) the provision of updated and changed information necessary for directory publishers to maintain accurate up-to-date databases and to identify newly established businesses and residences for purposes of advertising sales and delivery of directories. Such data updates shall be made available on a regularly recurring basis (e.g., weekly, monthly).

(d) "Unbundled" provision of subscriber list information means the provision of only such information as is requested by the requesting publisher. For example (but not by way of limitation), subscriber list information should be available separately for business and residence subscribers, or sorted by reasonable geographic criteria such as prefixes or postal codes. Subscriber list information shall also be unbundled on a temporal basis such that a listing, once purchased, need not be repurchased each time a directory publisher desires to publish a directory.

(e) "Nondiscriminatory" provision of subscriber list information means the provision of such information to all publishers on rates, terms, and conditions that, in practical effect, confer no advantage on the telecommunications carrier's affiliated or sponsored directory publisher over competing or other directory publishers.

(f) "Reasonable" rates, terms, and conditions for the provision of subscriber list information means:

(i) rates that do not exceed the telecommunications carrier's incremental cost to provide the subscriber list information, including the actual cost of computer programs reasonably necessary to provide the information to the publisher, the direct costs associated with provision of the information to the publisher, and a reasonable return, and

(ii) terms and conditions that enable efficient and economical use of subscriber list information by directory publishers for production of directories.

(g) Format: Subscriber list information must be provided in a format that is convenient, usable, and reasonably feasible, both for telecommunications carriers to provide and for directory publishers to utilize. Subscriber list information should be available in both a "camera ready" format and in an electronic medium that is generally available (e.g. ASCII).

(h) Complaints regarding the provision of subscriber list information and the rates, terms, and conditions for such provision may be brought before the Commission by the filing of a complaint. The complaint must be in writing and must identify the complainant and describe with reasonable clarity the act, omission, practice, rate, term, or condition alleged to be unlawful or unreasonable. The telecommunications carrier shall have 30 days from service of the complaint in which to file a written response, which must be served on the complainant. The burden shall be on the telecommunications carrier to prove that the challenged act, omission, practice, rate, term, or condition is lawful. Within 20 days after service of a response, the complainant may file and serve a reply which shall be responsive to matters contained in the response and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the response.

(i) To the extent that a state public service commission actively supervises, by rule or tariff, the provision of subscriber list information, such rules and tariffs shall be consistent with Section 222(e) of the Communications Act of 1934, as amended, and these rules. Complaints regarding violation of a state commission's rule, order, or tariff governing the provision of subscriber list information to directory publishers, shall be brought before the state commission with a direct appeal to the Commission.

(j) Subscriber list information pertaining to a subscriber to a telecommunications carrier's services that requests that

such subscriber list information not be published in directories published by or for the carrier need not be provided to directory publishers except that, if the telecommunications carrier uses such unlisted or unpublished name and address information, or permits the use of unpublished name and address information by an affiliate or others, for the purpose of delivering directories, such unpublished information shall be furnished on reasonable and nondiscriminatory terms and conditions to all directory publishers that request it for the sole and exclusive purpose of enabling the recipient directory publisher to cause its directories to be delivered to the subscriber.

(k) A telecommunications carrier may require a person requesting subscriber list information pursuant to this section to certify in writing that the requesting person will use the information solely in connection with publishing directories in any format (including, but not limited to, soliciting and selling advertising in such directories, compiling and publishing subscriber listings in alphabetical, classified, or other arrangements, delivering directories, and rendering bills for advertising and other related services). If a telecommunications carrier believes that the certification is erroneous or untrue, it may seek permission from the Commission (or, if the provision of the subscriber list information at issue is actively regulated by a state public service commission by rule or tariff, from that commission) to refuse future provision of such information to the requesting person. Subscriber list information shall not be withheld during the pendency of any such request for permission to refuse the provision of information.

EXHIBIT 2

Identical letter messengered to all conferees

December 5, 1995

The Honorable Larry Pressler
Chairman; Committee on Commerce, Science, and Transportation
Washington, DC 20510

Dear Chairman:

Both the House and Senate versions of S. 652, the telecommunications reform legislation, contain provisions (section 105(a) of the House bill and section 301(c) of the Senate bill) which would require that all local exchange telephone providers provide subscriber list information, as defined in the bill, to any person upon request for the purpose of publishing directories. Under the bills, subscriber list information must be provided "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms and conditions." This provision was adopted by the House and Senate without dissent, and is intended to respond to over a decade of anticompetitive abuses by which local telephone service providers have sought to restrict independent telephone directory publishers' access to listing information, which is essential to their business.

These abuses have taken the form of price listings at hundreds and even thousands of times the actual cost of delivering them to independent publishers, requiring that listings and updates be purchased in formats that are excessive, inadequate, or outdated, and in many cases refusing to sell listings at all. These abuses are continuing today, and without a statutory requirement such as this one, independent directory publishers have only one legal remedy, a costly and lengthy antitrust suit against the telephone company involved. Publishers have and are now filing such suits, and the record of local telephone company abuse has been upheld repeatedly by the courts.

The conference committee on the legislation has been considering report language which would further explain the concept of "reasonable rates." Independent publishers strongly support language which would indicate that the incremental cost of providing subscriber list information to the requesting party is a significant factor in determining what is reasonable compensation to a local exchange provider. (See attached language.) However, the Yellow Pages Publishers Association has opposed that language, and has in fact been lobbying for a formulation which would state that reasonable compensation should include at least the cost of "gathering, maintaining and providing" the information to independent directory publishers.

The undersigned independent publishers are members of the Yellow Pages Publishers Association, and we disagree with, and oppose strongly, the position the Association is taking. We constitute 67% of the members of the Yellow Pages Publishers Association, and we dissent. Those who would lobby you on behalf

of the Yellow Pages Publishers Association are giving you the position of a small group of Association members who are directory publishing subsidiaries of telephone companies, and who have never been the victims of the anticompetitive abuses of their parents.

Directory publishing is supposed to be one area of telephone service that is, and has been, completely open to competition. However, the record is full of abusive monopoly practices used by telephone companies against independent publishers. It is critical that report language clarify that the incremental cost of delivering listings to directory publishers is a significant factor in determining the reasonable price to be charged for the listings. It will prevent local service providers from charging high prices by loading on additional costs or by seeking excessive profits.

The telephone companies and their publishing subsidiaries are trying to open a giant loophole in protection against pricing abuses; independent publishers are trying to assure that it remains closed. These companies claim they speak for the industry, but they do not. Independent publishers are small businessmen and women in hundreds of towns and cities across the United States, and we want what the subscriber list information section of the telecommunications legislation is intended to provide — competition without fear of monopoly abuse.

We urge you to support and press for conference committee report language that states that the incremental cost of providing listings to publishers is a significant factor in determining reasonable compensation. If you or your staff would like to discuss this issue further, please feel free to contact anyone on this list.

Sincerely,

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